

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA
4

5 Brian Borenstein,

6 Plaintiff

7 v.

8 The Animal Foundation, et al.,

9 Defendants

Case No. 2:19-cv-00985-CDS-NJK

Order Denying Plaintiff's Appeal from the
Report & Recommendation, Denying
Plaintiff's Motion for Leave to File
Additional Documents

[ECF Nos. 270, 272]

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11 Plaintiff Brian Borenstein appeals from the Honorable United States Magistrate Judge
12 Nancy J. Koppe's order denying his motion to compel disclosure of the identity of the adopters
13 of Borenstein's dog, Mana. *See generally* Pl's Mot., ECF No. 270; Order, ECF No. 268. In sum,
14 Borenstein argues that preventing accessing to this information denies him the remedy of
15 replevin, ECF No. 270 at 2, and impermissibly limits discovery he claims is necessary to prove
16 several pending causes of action. *Id.* at 10-11. Defendants oppose the appeal. *See generally* ECF No.
17 271. Borenstein also requests leave to file additional documents in reply to defendants'
18 opposition. *See generally* ECF No. 272. Having considered the moving papers, I determined that
19 the motions can be resolved without oral argument. Fed. R. Civ. P. 78; LR 78-1.

20 For the reasons set forth herein, I deny plaintiff's appeal as well as plaintiff's request to
21 file additional pages in reply and affirm Magistrate Judge Koppe's order in its entirety.

22 **I. Legal Framework**

23 The Federal Magistrates Act, which governs the jurisdiction and authority of federal
24 magistrates. 28 U.S.C. §§ 631-39. The Act states that a magistrate judge may "hear and determine
25 any pretrial matter pending before the court except" motions for injunctive relief, dispositive
26 motions, or motions to suppress evidence in criminal cases. 28 U.S.C. § 636(b)(1)(A).

1 A district court judge may only reconsider a pretrial matter decided by a magistrate
 2 judge under 28 U.S.C. § 636(b)(1)(A) “where it has been shown that the [] order is clearly
 3 erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A); *see also* LR IB 3-1(a). “A finding is clearly
 4 erroneous if [the court is] ‘left with the definite and firm conviction that a mistake has been
 5 committed.’” *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1100 (9th Cir. 2014) (quoting *Easley v.*
 6 *Cromartie*, 532 U.S. 234, 242 (2001)). “An order is contrary to law when it fails to apply or
 7 misapplies relevant statutes, case law or rules of procedure.” *UnitedHealth Grp., Inc. v. United*
 8 *Healthcare, Inc.*, 2014 WL 4635882, at *1 (D. Nev. Sept. 16, 2014). The Court “may not simply
 9 substitute its judgment for that of the deciding court.” *Grimes v. City & County of San Francisco*, 951
 10 F.2d 236, 241 (9th Cir. 1991).

11 II. Plaintiff’s Motion for Leave to File Additional Documents

12 Plaintiff seeks leave of court to file additional a reply brief to defendants’ response to
 13 plaintiff’s appeal from Magistrate Judge Koppe’s R&R. *See generally* ECF No. 272. The Local
 14 Rules of this District govern the briefing schedule for challenges to magistrate judges’ orders. *See*
 15 LR IB 3-1 (“Replies will be allowed only with leave of the court.”).

16 In the proposed filing, plaintiff seeks to introduce “public information [which] has come
 17 to light [that] demonstrates why [The Animal Foundation] should not be given the benefit of
 18 any public policy consideration.” ECF No. 272 at 2. Specifically, plaintiff moves to file two
 19 documents, both Las Vegas Review-Journal news reports, into the record. *Id.* at 3. The first
 20 details a Las Vegas councilwoman’s visit to The Animal Foundation shelter while the second
 21 describes staff walkouts at The Animal Foundation. *Id.* Defendants respond that plaintiff’s
 22 proposed reply brief adds new information which (1) is irrelevant to the underlying litigation
 23 and (2) violates this district’s policy of looking with disfavor on reply briefs that introduce new
 24 evidence. ECF No. 273 at 1-2.

25 While I “need not consider arguments raised for the first time in a reply brief[.]” *Zamani v.*
 26 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007), I agree that the proposed excess pages for plaintiff’s

1 reply, concerning reports regarding general practices at The Animal Foundation, are wholly
2 irrelevant to the factual circumstances or legal standards properly pertaining to my review of
3 Magistrate Judge Koppe's order. Plaintiff's motion fails to explain why I should grant leave to
4 permit these documents into the record. I thus deny the motion for leave to file an additional
5 document.

6 However, plaintiff requests that I "take note that [The Animal Foundation] has . . .
7 untimely fil[ed] its response [ECF No. 271]" to plaintiff's motion. ECF No. 272 at 2. Plaintiff is
8 correct. Plaintiff's objection was filed on September 7, 2021. ECF No. 272. The response was due
9 on September 21, 2022. *See* LR IB 3-1 ("The deadline to file and serve any responses to the
10 objections is 14 days after service of the objection."). The response was admittedly filed at 12:01
11 am on September 22, 2022. ECF No. 273 at 2. Even though counsel for The Animal Foundation
12 "does not believe his filing was untimely submitted," the clock, not belief, is what determines
13 adherence to this District's local rules. I caution counsel to adhere to deadlines in the future, as
14 plaintiff aptly points out that the defendants have now missed multiple deadlines. Nonetheless,
15 one minute of delay does not cause great prejudice to the plaintiff and I can excuse this instance
16 of tardiness.

17 **III. Plaintiff's Appeal from the Report & Recommendation**

18 As a threshold matter, Plaintiff fails to cite to any authority demonstrating that
19 Magistrate Judge Koppe's order is either contrary to law or clearly erroneous (i.e., the standard
20 for non-dispositive motions) but rather argues that I should review Magistrate Judge Koppe's
21 order under the more deferential *de novo* standard (applied to rulings on dispositive motions).
22 Plaintiff thus contends that Magistrate Judge Koppe exceeded her authority and realleges some
23 of the arguments made in his motion to compel. Defendants respond that I should review the
24 magistrate judge's order under the less stringent standard of determining whether the order was
25 clearly erroneous or contrary to law.

1 Magistrate Judge Koppe issued an order denying Plaintiff's motion to compel defendants
2 to disclose the identity of Mana's adopters. However, plaintiff fails to demonstrate how the
3 order denying his motion to compel is a dispositive motion. Plaintiff asserts that "the order is
4 tantamount to granting summary adjudication, without any discovery, by dispositively
5 precluding Plaintiff from obtaining [the remedy of replevin] and denying Plaintiff the ability to
6 name the fictitious parties properly." ECF No. 270 at 11.

7 Plaintiff's arguments fail because he does not support his proposition that an order
8 denying a motion to compel is similar to an order granting summary judgment under the scope
9 of the authority of magistrate judges. There are two avenues by which a magistrate's order might
10 be considered dispositive: those orders mentioned explicitly by 28 U.S.C. § 636(b)(1)(A), and
11 those orders whose effect disposes of a claim or defense of a party. *See Flam v. Flam*, 788 F.3d 1043,
12 1045-46 (9th Cir. 2015) (stating that "[t]he matters listed in 28 U.S.C. § 636(b)(1)(A) are
13 dispositive while, *in general*, other matters are non-dispositive" but noting that "[t]o determine
14 whether a motion is dispositive," courts should "look[] to the effect of the motion" (citing *United*
15 *States v. Rivera-Guerrero*, 377 F.3d 1064, 1068 (9th Cir. 2004))).

16 28 U.S.C. § 636(b)(1)(A) lists motions for summary judgment among the dispositive
17 motions but does not mention motions to compel. An order on a motion to compel is not per se
18 dispositive and plaintiff's attempt to make it so are unconvincing. I now turn to the effect of the
19 order.

20 Magistrate Judge Koppe's order prevents plaintiff from compelling the identity Mana's
21 adopters (assuming the identity is actually known by defendants). Plaintiff does not explain
22 how that function disposes of his specific claims by way of reference to the elements of the
23 claims or how the denial of his discovery request necessitates the impossibility of proving those
24 claims. For example, plaintiff asserts that "[w]ithout knowing the details of Mana's disposal,
25 [plaintiff] cannot present evidence that will allow him to prove intentional conduct or
26 deliberate indifference; nor can he obtain the injunctive relief for the return of [Mana]." ECF No.

270 at 10. Such a conclusory allegation does not suffice to demonstrate that plaintiff has no chance of succeeding under specific causes of action. Plaintiff needs to demonstrate that Magistrate Judge Koppe's order prevents *any chance* of success for her order to be tantamount to summary judgment in defendant's favor.

Thus, the magistrate judge was well within her authority to resolve the case by way of an order. Plaintiff's arguments fail because, despite repetitive insistence to the contrary¹, the disclosure of the identity Mana's adopter(s) does not deny plaintiff the ability to receive the relief he requests. While I could overrule the objection for failing to cite to points and authorities² demonstrating the order was clearly erroneous or contrary to the law, I nonetheless conducted a *de novo* review and address the reasons for overruling the objection herein.

A. Plaintiff is not entitled to injunctive relief

Plaintiff argues that he is entitled to an order of possession upon his replevin claim, asserting that replevin is a form of injunctive relief. *See generally* ECF No. 270 at 10. It is unclear why plaintiff is asserting that this is a form of injunctive relief. The Federal Rules of Civil Procedure specifically provide that "every remedy . . . under the law of the state where the court is located" is available throughout an action. Fed. R. Civ. P. 64(a). Subsection (b) of the same rule specifically identifies replevin as an available *remedy*. Fed. R. Civ. P. 64(b) (emphasis added). The replevin statute in Nevada provides that "the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter." NRS 31.840. Thus, as

¹ See ECF No. 271 at 2 n.1 (collecting repeat decisions denying the disclosure of who adopted Mana). Plaintiff claims that the language in Magistrate Judge Koppe's order – expressing concern that plaintiff's counsel was veering to the realm of improper lawyering – was "unwarranted." ECF No. 270 at 14 n.8. I disagree. The inclusion of that footnote in plaintiff's objection, together with counsel's repetitious arguments on a subject that has already been decided during litigation, indicates that Magistrate Judge Koppe's admonition was warranted.

² The failure of a moving party to file points and authorities in support of the motion constitutes a consent to the denial of the motion. LR 7-2(d).

1 relevant to this case, Borenstein **must** demonstrate (1) that he is the owner of the property
2 claimed, or is lawfully entitled to the possession thereof; (2) that the property is wrongfully
3 detained by the defendants; (3) the alleged cause of the detention thereof according to best
4 knowledge, information and belief; (4) that the same has not been taken for a tax, assessment or
5 fine pursuant to a statute, or seized under an execution or attachment against the property of
6 the plaintiff, or, if so seized, that it is by statute exempt from such seizure; and (5) the actual
7 value of the property. The very first prong that must be met to exercise replevin is ownership,
8 which is still at issue in this matter, and therefore not met. The second prong that must be met
9 to exercise replevin is that the property is wrongfully detained by the defendants, although in
10 this case, neither party contests that defendants do not remain in possession of Mana.
11 Consequently, the second prong is also not met. Without meeting the first two prongs, plaintiff
12 fails to meet his burden.

13 Further, the objection fails to address *why* the identity of Mana's adopters would
14 prevent him from exercising the remedy of replevin. If plaintiff is successful in this action, then
15 remedies – replevin or otherwise – come into play. Thus, why plaintiff needs disclosure of the
16 name(s) of Mana's adopters *at this time* is lacking.

17 To the extent plaintiff is attempting to relitigate his already denied requests for
18 injunctive relief (ECF Nos. 19, 77), this is procedurally improper. Objections to the order on the
19 motion to the compel are not avenues to request reconsideration.

20 Accordingly, plaintiff's objection that denying access to the identity of Mana's adopter(s)
21 denies him the relief he is seeks is overruled.

22 **B. The identity of who adopted Mana is irrelevant to establishing the elements of**
23 **the causes of action identified in the objection**

24 The remainder of plaintiff's objection are summary assertions that denying
25 him access to the identity of Mana's adopter(s) limits his ability to present evidence at trial.
26 Specifically, plaintiff argues that without this information, he cannot present evidence that will

1 allow him to prove intentional conduct, deliberate indifference, and/or mere negligence related
2 to the second, third, seventh, twelfth, thirteenth, fourteenth, and fifteenth causes of action³
3 without the ability to discover the circumstances regarding the disposition of Mana. ECF No.
4 270 at 10-11. Like the argument regarding preventing the remedy of replevin, plaintiff's objection
5 fails to address *why* the identity of Mana's adopters would deny him ability to prove said
6 conduct. Moreover, the objection fails to address how the names of the adopter(s) would be
7 relevant to those causes of action.

8 For example, the second and third causes of action in the second amended complaint
9 (SAC) allege equal protection and due process violations against The Animal Foundation (TAF)
10 and Clark County's animal control division (CCAC). ECF No. 189 at 34-39. A review of the
11 allegations reveal they are tethered to TAF and CCAC's deprivation of Borenstein of owning
12 Mana. *Id.* Paragraph 218 states *defendants* – not Mana's owners – should be enjoined from
13 continued discriminatory conduct. Similarly, paragraph 233 states that the *defendants* – not
14 Mana's owners – should be enjoined from any contemplated action whereby an animal is taken
15 from a hospitalized individual for subsequent adoption to a third party without a meaningful
16 remedy before the adoption occurs and to advise injured persons of any available post-seizure
17 and adoption remedies. The identity of Mana's adopter(s) would have nothing to do with TAF
18 and CCAC's actions regarding taking the animal, nor what if any remedies Borenstein could
19 have or should have been informed about. Thus, the identity of Mana's owner(s) is not necessary
20 to proving deprivation as part of those allegations set forth in the SAC.

21 The seventh cause of action is asserted against CCAC and alleges that CCAC, by way of
22 its officers, employees, supervisors and others, violated the Americans With Disabilities Act

23
24 ³ The causes of action in the second amended complaint are misnumbered. The thirteenth cause of action
25 is set forth starting on page 61. The next cause of action, starting on page 64, which would be the 14th is
26 misnumbered. In writing this order, the Court considers the 14th cause of action as the one on page 64,
the 15th cause of action as the set forth starting on page 66, the 16th cause of action as the one set forth
starting on page 67, so on and so forth.

1 (ADA) by discriminating against Borenstein on the basis of his disabilities. *See generally id.* at 44-
2 47. As remedy to the allegations, plaintiff seeks (1) a declaration that CCAC violated his rights
3 under the ADA and Rehabilitation Act and that he is the rightful owner of Mana, and (2) a
4 permanent injunction requiring CCAC to comply with the ADA and Rehabilitation Act in the
5 future by ensuring that, if an adoption is completed in violation of the ADA, the adoptive party
6 is notified of the error, and the contracted shelter makes reasonable efforts to reclaim the animal;
7 and by taking effective efforts to ensure that Mana is returned to Borenstein. *Id.* at 46. Plaintiff
8 fails to demonstrate how Mana's adopters would have played a role in alleged discriminatory
9 acts by CCAC. If Borenstein is successful in this action, the relief requested still does not require
10 disclosure of Mana's owners *at this time*. In fact, even if Borenstein is entitled to the relief he is
11 requested, the remedy he requests could be carried out by TAF and/or CCAC without those
12 defendants ever disclosing the name the adopters.

13 The twelfth cause of action, negligence, is alleged against Sunrise Hospital, CCAC, TAF,
14 and Chief Operation Officer Scholten. ECF No. 189 at 54-60. The negligence claims against those
15 defendants are related to the actions from the time Borenstein was initially hospitalized until he
16 was denied the opportunity to reclaim Mana. This cause of action is unrelated to who adopted
17 Mana, as it occurred before the adoption ever happened.

18 The thirteenth cause of action sets forth allegations of negligent training, supervision,
19 and retention against defendants Sunrise Hospital and TAF. *Id.* at 61-63. Again, this cause of
20 action is wholly unrelated to the identity of who adopted Mana.

21 The fourteenth cause of action – Neglect or Abuse of a Vulnerable Person – is alleged
22 against Sunrise Hospital, CCAC, TAF, and Chief Operation Officer Scholten. *Id.* at 64-66. The
23 SAC sets forth the specific allegations lodged against the aforementioned defendants, but those
24 allegations are unrelated to the identity of Mana's adopters.

1 The remainder of Borenstein's causes of action are likewise unrelated to the identity of
2 Mana's adopters, thus rendering that information irrelevant at this time. His prayers for relief
3 are likewise unrelated to pre-trial disclosure of the identity of Mana's adopters. *See id.* at 73-76.

4 **IV. Conclusion**

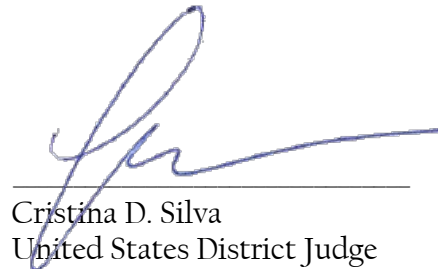
5 Plaintiff has not identified how the Magistrate Judge's order was clearly erroneous or
6 contrary to the law. Accordingly, IT IS HEREBY ORDERED that plaintiff's objection to the
7 magistrate judge's order denying plaintiff's motion to compel (ECF No. 270) is OVERRULED.

8 IT IS FURTHER ORDERED that Magistrate Judge Koppe's order denying plaintiff's
9 motion to compel (ECF No. 268) is AFFIRMED in its entirety.

10 IT IS FURTHER ORDERED that plaintiff shall not seek disclosure of the identity of
11 Mana's adopter(s) without leave of court. Any motion seeking that information must meet the
12 standard for either a motion for reconsideration and/or setting forth a change in circumstance
13 warranting pre-trial disclosure of that information.

14 IT IS SO ORDERED.

15 DATED: October 20, 2022

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18 Cristina D. Silva
19 United States District Judge
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